



HAN KUN LAW OFFICES

# Legal Commentary



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## Capital Market Law

### **CSRC Cancels the “456 Conditions” to Encourage Domestic Enterprises’ Overseas Offerings and Listings**

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On December 20, 2012, the China Securities Regulatory Commission (the “**CSRC**”) released the *Regulatory Guidance on Application Documents of and Review Procedures for Overseas Offering and Listing of Joint-Stock Companies* (the “**Guidance**”), which clarifies the conditions, application documents, and review procedures for domestic enterprises’ overseas offerings and listings. The Guidance will take effect on January 1, 2013. The *Notice on Issues concerning Application for Overseas Listing by Enterprises* (Zheng Jian Fa Xing Zi [1999] No. 83, the “**Notice**”) issued by the CSRC on July 14, 1999 will be repealed simultaneously.

The Guidance 1) relaxes the limitation for domestic enterprises’ overseas offerings and listings, 2) no longer sets conditions on enterprise finance for enterprises’ overseas listings, 3) cancels the original pre-procedure that requires the enterprise to solicit the opinion of the Public Offering Supervision Department of the CSRC on the overseas listing application, and 4) simplifies the review procedures and application documents. The Guidance therefore makes it more adjustable to meeting the financing needs of domestic enterprises particularly small and medium-sized enterprises (“SMEs”) in overseas offerings and listings as well as in H-share offerings and listings. This Guidance is also helpful in reducing the stress formed by too many projects waiting to get approved by the CSRC on the A-share market. The details of the Guidance are as follows:

#### **Relaxing the Limitations for Domestic Enterprises’ Overseas Listings, Canceling the Requirements on Finance, Purposes of Funds Raised, and Foreign Exchange Sources of Dividends for Enterprises’ Overseas Listings**

The Guidance provides that joint-stock companies established according to the *Company Law of the People’s Republic of China* (“**Company Law**”) can independently file overseas offering

and listing applications with the CSRC if they meet the relevant local listing conditions. In addition, the Guidance no longer sets conditions on net assets, net profits, and raised amounts, and only requires legally established domestic enterprises proposing overseas listing to comply with the relevant local listing requirements.

Before its repeal by the Guidance, the Notice required domestic joint-stock companies applying for listing on overseas main board markets to meet a series of conditions, which includes the following:

- 1) Requirements of raised purpose: the purpose of funds raised shall conform to the provisions of the national industrial policies, foreign investment utilization policies, and the relevant regulations on the initiation of fixed asset investments;
- 2) Financial requirements of net asset, net profit, and raised amount: the net assets shall be not less than RMB 400 million, the after-tax profits in the previous year shall be not less than RMB 60 million, and the amount raised from the domestic enterprise's offering and listing shall have the potential for growth. The raised amount shall be not less than USD 50 million based on a reasonable forward price-to-earnings ratio (these requirements are collectively referred to as the "**456 Conditions**");
- 3) Requirements of corporate governance: enterprises shall have a standard corporate governance structure, an integrated internal management system, a stable senior management, and a high-level management; and
- 4) Requirements of foreign exchange sources of dividends: dividends after listing shall have reliable sources of foreign exchange and comply with the relevant state regulations on foreign exchange administration.

The conditions on purpose of funds raised and foreign exchange sources, as well as the 456 Conditions in the Notice have all played a positive role in promoting large enterprise overseas listings. However, the conditions at the same time hinder some exceptional small and medium-sized enterprises from listing overseas. Although the local overseas listing requirements are mostly lower than that of the CSRC, before the Guidance was issued, small and medium-sized private enterprises that failed to meet the above-mentioned conditions were only able to do overseas listing indirectly by transforming the company into a Red Chip<sup>1</sup>. After the Guidance is put into effect, domestic enterprises can file overseas listing applications if they meet the relevant local listing conditions, which will further widen the means for small and medium-sized enterprises' overseas listings.

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<sup>1</sup> Red Chip here refers to when a domestic Chinese enterprise transfers its domestic assets to the offshore enterprises through methods such as a stock-swap in order to make itself adhere to the requirements of the overseas offering and listing.

## **Canceling the Original Pre-procedure that Requires Enterprises to Solicit the Opinion of the Public Offering Supervision Department of the CSRC on Overseas Listing Applications**

Before the Guidance is put into effect, according to the Notice, three months prior to filing a preliminary application with an overseas securities regulatory authority or stock exchange<sup>2</sup>, an enterprise shall submit the relevant documents to the CSRC, and shall solicit the opinion of the Public Offering Supervision Department of the CSRC on the overseas listing application. Only after obtaining a written notice of approval for the application issued by the CSRC, can an enterprise file a preliminary application with an overseas securities regulatory authority or stock exchange.

The Guidance revokes the original pre-procedure that requires enterprises to solicit the opinion of the Public Offering Supervision Department of the CSRC on the overseas listing application. After the Guidance has been put into effect, domestic enterprises will be able to independently file overseas listing applications with the CSRC if they meet the local overseas listing requirements. The CSRC will conduct a formal examination to decide whether or not to accept the application. Where the application falls within the CSRC's scope of authority and the application documents are complete as well as conform to the statutory format, the acceptance department shall issue a notice of acceptance according to the *Provisions of the China Securities Regulatory Commission on the Implementation Procedures for Administrative Permit*. The CSRC will not conduct substantive reviews when deciding whether or not to accept the application documents of domestic enterprises' overseas offering and listing. After receiving the CSRC's notice of acceptance, domestic enterprises can file a preliminary application with an overseas securities regulatory authority or stock exchange.

## **The CSRC Can Choose Whether to Consult with the National Development and Reform Commission**

The Guidance states that after receiving the application documents, the CSRC can consult with the appropriate departments about the national industrial policies, foreign investment utilization policies, and the relevant regulations on fixed asset investment administration.

The Notice provides that the CSRC shall consult with the State Planning Commission and the State Economic and Trade Commission (that is the predecessor of the National Development and Reform Commission of the People's Republic of China, hereinafter referred to as the "NDRC") about whether the relevant applications conform to the provisions of the national industrial policies, foreign investment utilization policies, and the relevant regulations on the initiation of fixed asset investments. According to the Notice, it is necessary for the CSRC to

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<sup>2</sup> An example of this would be submitting a Form A1 to the Hong Kong Stock Exchange when applying for an H-share offering.

consult with the NDRC about the initiation of fixed asset investments and related issues when reviewing the application for domestic enterprises' overseas listings.

The Guidance provides that the International Department of the CSRC can independently decide whether or not to consult with the relevant departments including the NDRC. It is no longer necessary to consult with the NDRC. For small and medium-sized enterprises with no relation to fixed asset investment projects, the CSRC may not consult with the NDRC.

### **Simplifying the Application Documents Submitted to the CSRC**

The Guidance streamlines the application documents submitted to the CSRC. Compared to the provisions of the Notice, the Guidance stipulates that domestic enterprises applying for overseas offering and listing need not submit the following documents to the CSRC:

- 1) The application report need not include a restructuring plan and profit forecast of the current year as well as the basis of the forecast;
- 2) The approval document for the enterprise's overseas listing issued by the Provincial People's Government in the place where the enterprise is located or in the relevant departments under the State Council;
- 3) The analysis and recommendation report on the enterprise's listing from an overseas investment bank;
- 4) The written reply of an approval authority on the establishment of a joint-stock company and the conversion into an overseas fundraising company;
- 5) The confirmation document of asset evaluation and the written reply on state-owned equity management issued by the state-owned assets administration department;
- 6) The confirmation document of land use rights evaluation and the written reply on the plan for land use rights disposal issued by the land and resource administration department;
- 7) The restructuring agreement, the service agreement, and other relevant agreements on tariff trade;
- 8) The asset evaluation and profit forecast reports.

The Guidance requires that domestic enterprises applying for overseas offering and listing submit the following additional documents:

- 1) The application report shall include corporate governance structure, operational risk analysis, and development strategy;
- 2) The relevant board resolution;

- 3) The Business License of the company, the business approval certificates for special approval business (if applicable);
- 4) The regulation opinion letter issued by the business supervision authorities (if applicable);
- 5) The relevant written reply on state-owned equity set and state-owned equity reduction/transfer issued by the state-owned assets administration department (if applicable);
- 6) The examination, approval, and registration documents of the raising of funds investment project (if applicable);
- 7) The tax certificate documents; and
- 8) The environmental certificate documents.

### **Retaining the Approval Procedure of CSRC**

The Guidance provides that domestic enterprises can file a preliminary application with an overseas securities regulatory authority or stock exchange after obtaining the CSRC's notice of acceptance. Such domestic enterprises can also file a formal application with an overseas securities regulatory authority or stock exchange after obtaining the CSRC's administrative approval document.

The Guidance retains the provision of the Notice that before filing a formal application with an overseas securities regulatory authority or stock exchange, domestic enterprises shall obtain the CSRC's administrative permit document. In addition, the domestic enterprise's overseas offering and listing shall still be subject to CSRC examination, approval, and supervision.

### **A Written Report Shall Be Submitted to the CSRC When Listing and Transfer Listing**

The Guidance provides that enterprises shall submit a written report on the overseas offering and listing to the CSRC within 15 workdays after its completion. In addition, enterprises that transfer list on different boards in the same country shall submit a written report on its transfer listing to the CSRC within 15 workdays after its completion. Enterprises in any circumstances mentioned hereinbefore only need to submit to the CSRC for filing and the CSRC will not conduct a substantive examination.

## **Important Announcement**

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